

Getting Disaster Assistance from FEMA: the Basics, the Audits, and the Compliance Risks

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Michelle F. Zaltsberg
Orlando, Florida
(407) 367-5433
mzaltsberg@bakerdonelson.com

Ernest B. Abbott
Washington, D.C.
(202) 508-3425
eabbott@bakerdonelson.com

Why Should Electric Utilities Care about FEMA?

- **FEMA disaster grants to electric utilities are “material”. Since 2010:**
 - FEMA awarded over \$550 million to electric utilities
 - 12 grants in excess of \$10 million
 - Nearly 100 grants in excess of \$1 million
- **FEMA policy allows retroactive deobligation of disaster grants based on:**
 - improper procurement, unreasonable cost, work beyond approved scope, FEMA mistake in approving scope
 - **“Deobligation” means FEMA takes the funds back—even if they’ve already been spent!**

Why Should Electric Utilities Care about FEMA?

- **Deobligation Risks:**
 - OIG recommendations: \$51.2 Million Deobligation of Cimarron Electric Cooperative
 - FEMA Deobligations: City of Vero Beach
- **Success in retaining funds depends on**
 - pre-disaster policies and procedures
 - compliance with rules and policies during performance
 - documentation of procurements and expenditures segregated by FEMA grants

Power Restoration Timeline

- Disaster expenditures precede application for FEMA funding!
- Timeline:
 - Disaster damages lines and poles
 - Crews get the power back on
 - Work is complete
 - President declares disaster and FEMA arrives
- Yet, for FEMA reimbursement, utilities must show expenditures complied with federal grant rules...



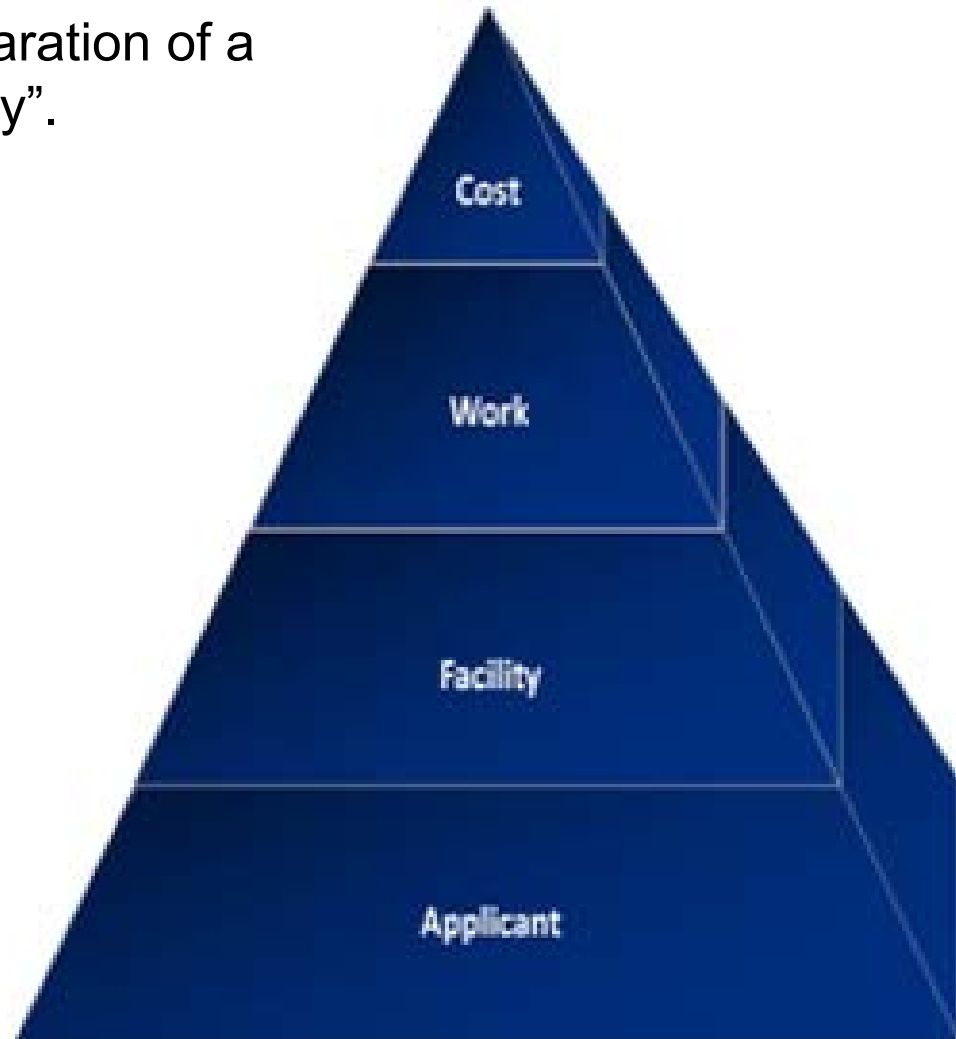
...this timeline creates risk where your procedures for non-disaster power restoration differ from FEMA-funded power restoration.

Eligibility Criteria

Triggered by Presidential declaration of a “Major Disaster” or “Emergency”.

Four main components:

- Cost
- Work
- Facility
- Applicant



Eligible Applicant and Eligible Facility

- Eligible Applicant – an electric utility is eligible if:
 - It is a division of a local government or special district
 - It is a private non-profit organization that provides an essential government service

- Eligible Facility – includes buildings and distribution and transmission facilities that are:
 - the responsibility of an eligible applicant;
 - located in a designated disaster area;
 - not under the specific authority of another Federal agency; and
 - in “active use” at the time of the disaster
 - “Active use” means the primary use must be for eligible purpose (50% of space or time)

Eligible Work

To be eligible for funding, disaster recovery work performed on an eligible facility must:

- Be required as the result of a major disaster event;
- Be located within a designated disaster area; and
- Be the legal responsibility of an eligible applicant.

Eligible Work

“Emergency” work:

- Debris removal to obtain access to damaged lines
- Remove damaged trees and branches that impact conductor
- Work to restore power, including replace damaged poles, conductor, transformers, anchors

“Permanent” Work

- Repair, restore, replace, reconstruct damaged facilities
- “Permanent work” can occur during emergency power restoration

Eligible Cost

Generally, costs that can be directly tied to the performance of eligible work are eligible. Such costs must be:

- Reasonable and necessary to accomplish the work;
 - Can include direct administrative costs (“DAC”)
- Compliant with Federal, State, and local requirements for procurement; and
- Reduced by all applicable credits, such as insurance proceeds and salvage values.

Eligible Cost

- Eligible costs are determined:
 - on the basis of the design of such facility as it existed immediately prior to the major disaster;
 - in conformity with current applicable codes, specifications, and standards
 - in conformity with floodplain management and hazard mitigation criteria required by the President

FEMA Public Assistance Program

- Structured as a reimbursement program
 - Funds advanced only for a portion of emergency expenses
 - Critical to segregate accounts for FEMA-eligible expenditures
- Disaster Assistance funds are federal grants
 - Subject to Uniform Federal Grant Rules at **2 C.F.R. Part 200**

Federal Grant Regulations at 2 C.F.R. part 200*

- All federally funded work by electric utilities must comply with Super Circular procurement requirements
 - Financial and program management
 - Property Standards
 - **Procurement Standards [2 C.F.R. §§ 200.317-200.326]**
 - Performance and Financial Monitoring and Reporting
 - Record Retention and Access
 - Penalties for Non-compliance
 - **Audits [2 C.F.R. §§ 200.500-200.521]**

*Applies to disasters declared on or after December 26, 2014. Grant rules applicable to disasters declared before this date are at 2 C.F.R. Part 215 (2014) (for non-profits) and 44 C.F.R. Part 13 (for state, local, and tribal governments).

Pay Attention: Procurement Standards

- By far the largest single target area for DHS-OIG
- In FY 2014, resulted in 32 recommendations to disallow up to \$61,654,399 due to perceived procurement issues
- In the 6 years ending September 30, 2014, OIG questioned \$352.3 million in costs due to procurement issues
- Average lag time of audits – 5.9 years!

OIG to FEMA: Crack Down on Procurement Violations!

- Even where procurement violations were found, FEMA has historically allowed costs found “reasonable.”
- 2016 OIG Report:
 - FEMA has allowed 91% of costs questioned in OIG audit sample
 - Goals of proper procurement relate to more than just reasonable cost
 - Better enforcement would “motivate” recipients of federal funds to follow the rules

Most Common OIG Findings

- Noncompetitive contracting practices
- Failure to include required contract provisions
- Failure to employ required procedures to ensure small/minority/women-owned firms are used
- Cost-plus-percentage-of-cost contracting



Procurement Standards for Federal Grants

- General procurement standards (2 C.F.R. § 200.318)
- Competition (2 C.F.R. § 200.319)
- Methods of procurement (2 C.F.R. § 200.320)
- Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms (2 C.F.R. § 200.321)

Procurement Standards for Federal Grants

- Procurement of recovered materials (2 C.F.R. § 200.322)
- Contract cost and price (2 C.F.R. § 200.323)
- Awarding agency/pass-through entity review (2 C.F.R. § 200.324)
- Bonding requirements (2 C.F.R. § 200.325)
- Contract provisions (2 C.F.R. § 200.326 and Appendix II)

General Procurement Standards (2 C.F.R. § 200.318)

Focus today on FIVE of the EIGHT mandatory standards:

1. Maintain documented procurement procedures
 - must be compliant with State/local/federal
 - must be in writing and must be followed
 - *MUST EXIST PRE-DISASTER*
2. Maintain records sufficient to detail the history of procurement
 - Tip: create a checklist triggering and documenting compliance with other requirements

General Procurement Requirements (cont'd)

3. Award contracts to only responsible contractors
 - Document procedures for checking qualifications
 - Contractors must certify they and subcontractors are not debarred
 - Check SAM.gov website—no reimbursement for work awarded to debarred contractor

General Procurement Requirements (cont'd)

4. Special rules for time and materials/equipment contracts

- T&E contracts are permissible only
 - after a determination that **no other contract is suitable**; and
 - if the contract includes a **ceiling price** that the contractor exceeds at its own risk (2 C.F.R. 200.318(j));
- T&E contracts are considered by electric utilities to be necessary during power restoration
- Tip: create a checklist to document reasons for determination of suitability, cost analysis, development of ceiling price
- Tip: demonstrate monitoring of performance of work

T&E Contracts (cont'd)

- November 2016 Second Appeal Decision from FEMA HQ, *City of Vero Beach*:
 - Following an OIG Audit, FEMA deobligated (ie. took back funds previously provided and spent) nearly \$1 million of the City's contract costs.
 - On Appeal, FEMA HQ upheld denial because the City could not show that the T&M contract satisfied all procurement requirements.
 - This was *despite* City arguing that the 34,000 utility customers that were without power justified the T&M contract.
 - FEMA HQ allowed first 70 hours of costs but reduced other claimed costs down to pricing of lowest contract rate for similar work.

General Procurement Requirements (cont'd)

5. Conflicts of Interest

- Must have written standards of conduct covering conflicts of interest of employees (2 C.F.R. § 200.318(c)(1))
 - Applies to “employee, officer, or agent”
 - Must cover “real or apparent” conflicts
 - Must provide for disciplinary actions

Conflict of Interests (cont'd)

- *Employees/officers may not participate in contract decisions if they have a conflict* (2 C.F.R. § 200.318(c)(1))
 - “a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a **financial or other interest in or a tangible personal benefit** from a firm considered for a contract.”
 - Issue Areas:
 - Financial and business conflicts
 - Gifts and Gratuities

Conflict of Interests (cont'd)

- Examples of prohibited “financial or other interest” in a procurement
 - Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;
 - Consulting relationships (such as commercial and professional consulting and service arrangements);
 - Investment in the form of stock or bond ownership or partnership interest;
 - Real estate investments; and
 - Business ownership

Conflict of Interests (cont'd)

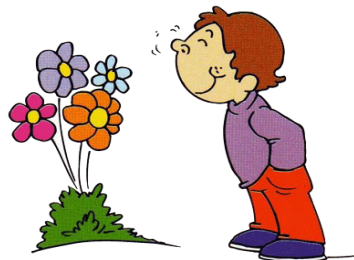
- Gifts and Gratuities
 - “Employees/officers may neither solicit nor accept gratuities, favors, or anything of monetary value” from contractors or subcontractors
 - Grant recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value
 - Nominal value not defined by regulation
 - Must be established in Code of Conduct

Conflict of Interest (cont'd)

- Gifts and Gratuities

- Focus should be on a balance of:

- whether the item of value is furthering the business interests of the utility,
 - whether the value is large enough that it could be seen as an attempt to improperly influence, and
 - whether the value is directed/intended to influence a specific person.



SMELL

Conflict of Interest Compliance Program

- Code of Conduct should specify system to assure compliance
Tips:
 - Annual Distribution of Procurement Code of Conduct
 - Acknowledgment Form signed by employees
 - Annual Training
 - Designate one person to manage compliance
 - KEEP RECORDS OF ALL ACTIONS
- Question: Can an effective compliance program be limited procurement of federally-funded contracts?

Conflicts of Interest (cont'd)

- Must have written standards of conduct covering “organizational conflicts of interest” (2 C.F.R. § 200.318(c)(2))
- Exclusion of contractors who develop or draft specifications, RFPs, etc. (2 C.F.R. 200.319(a))

Other Procurement Issues: Contract Cost and Price

- Cost or Price Analysis = *required*
 - For every procurement above the “Simplified Acquisition Threshold” – \$150,000
 - Document the cost analysis in procurement file
- Cost-plus-a-percentage-of-cost = illegal
 - Contrast: cost plus a fixed fee, where the fee is based upon a percentage of *estimated* cost

Other Procurement Issues: Contract Provisions

- Lists boilerplate provisions that must be included in contracts funded by federal grants
 - *E.g.*, EEO, Davis Bacon, Contract Work Hours and Standards, etc.
 - Should be included in standard form contracts pre-disaster



Other Procurement Issues: Minority Contracting

- Must “take all necessary affirmative steps to assure that minority businesses, women’s business enterprises, and labor surplus area firms are used when possible”
 - Regulation lists six specific affirmative steps
 - OIG recommends deobligation if not taken
 - Tip: establish a documented affirmative outreach program for minority contractors prior to disaster

Single Audit Requirement

- Required when the entity has expended \$750,000 or more in Federal funds during entity's fiscal year
- Must include all Federal awards and if applicable a schedule of prior year findings and the status
- 2 C.F.R. Part 200 Subpart F (previously OMB Circular A-133), Audits of States, Local Governments, and Non-Profit Organizations, implements the law and provides the basic requirements that must be followed

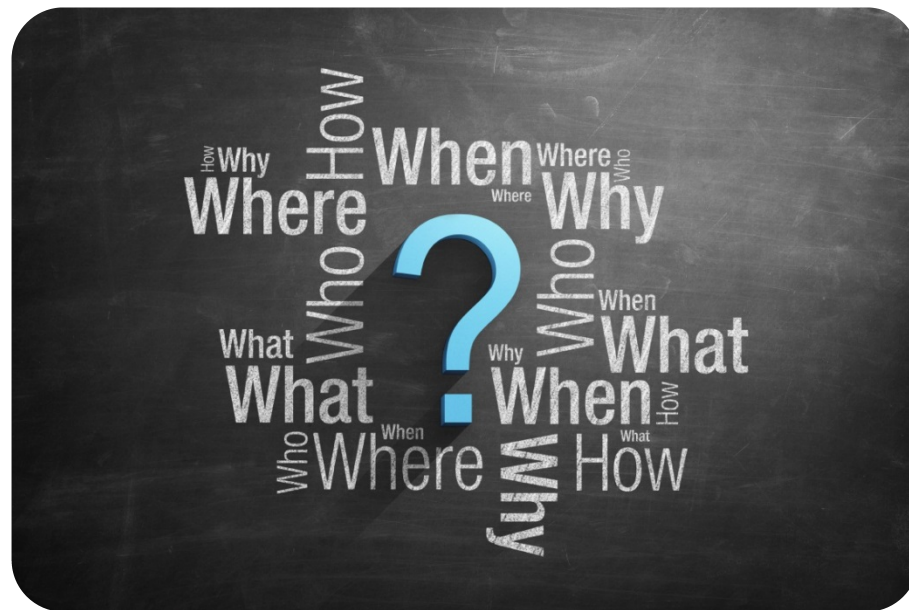
FEMA is Changing Delivery Model: Stay Tuned

- “In 2014, FEMA conducted an in-depth analysis of the existing Public Assistance program's delivery process. ... [t]he program had not evolved to meet the changing needs of its customers during the last 20 years.” – FEMA



- Changing Procedures can lead to mistakes – by FEMA and by utilities...

Questions?



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